

RUETHAICHOTAMON (Migration) [2019] AATA 4530 (22 July 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Nithipriya RUETHAICHOTAMON
CASE NUMBER:	1901339
HOME AFFAIRS REFERENCE(S):	BCC2018/4264455
MEMBER:	Alan McMurran
DATE:	22 July 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Statement made on 22 July 2019 at 11:14am

CATCHWORDS

MIGRATION – cancellation – Temporary Business Entry (Class UC) visas – Subclass 457 (Temporary Work (Skilled)) – relationship to the primary applicant ceased – member of the family unit – decision under review affirmed

LEGISLATION

Migration Act 1958, s 116
Migration Regulations 1994, r 1.12

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application lodged 21 January 2019 for review of a decision dated 16 January 2019 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116 (1)(a) on the basis that a particular fact or circumstance for the grant of the visa no longer exists. The applicant had been granted the visa on the basis of his relationship with the primary applicant, *Hoang Dat Bui*, ("the defacto partner") for a subclass 457 visa. The Department was notified by email on 16 August 2018 that the relationship upon which the applicant was dependent with the de facto partner had ceased. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant was invited under s. 360 of the Act to appear before the Tribunal on Monday, 22 July 2019 at 8:30 am to give evidence and present arguments. Hearing reminders were sent to the applicant by SMS message to the applicant's registered mobile number on 15 July 2019 and again on 19 July 2019. On the hearing day, the Member waited until approximately 8:50 am for the applicant, who did not appear.
4. Pursuant to s. 362B (1A), where the applicant is invited to appear before the Tribunal but does not appear on the appointed day and time and place, the Tribunal may make a decision on the review by written statement under s. 368, without taking any further action to allow or enable the applicant to appear before it to make arguments and submissions or provide information. The Tribunal has determined in this instance to proceed to decide the matter on the information before it.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.
6. *Background*
7. The applicant is a 36-year-old citizen of the Republic of Thailand. According to the Department's movement records¹, the applicant first arrived in Australia on 23 April 2013. The applicant was granted a dependent student visa on 22 October 2014.
8. On 22 April 2016, the Department granted a subclass 457 visa to the de facto partner.
9. On 26 October 2017, the Department granted the applicant a dependent subclass 457 visa with the de facto partner.
10. On 16 August 2018, the de facto partner's representative and migration agent advised the Department that the relationship between the applicant and the de facto partner had "*irretrievably broken down*".
11. On 16 January 2019, the Department cancelled the applicant's dependent subclass 457 visa, as set out below.

¹ DIBP file BCC2018/4264455

CONSIDERATION OF CLAIMS AND EVIDENCE

12. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116 (1)(a) where a particular fact or circumstance relevant to the grant of the dependent subclass 457 visa no longer exists. If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

13. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.
14. The applicant was granted a dependent subclass 457 visa on 26 October 2017 on the basis of an established de facto relationship with the de facto partner. That was a relevant fact, matter or circumstance for the grant of the visa.
15. Following notification by the de facto partner's representative on 16 August 2018 that the relationship between the de facto partner and the applicant had irretrievably broken down, the Department sent a letter to the applicant on 3 December 2018² enquiring as to his address details. The applicant responded on 7 December 2018 advising of his new address and email details for communication by the Department. He also provided a mobile telephone number.³
16. On 13 December 2018, the Department sent a letter to the applicant to his notified address advising him of *Notice of intention to consider cancellation* ("NOICC") of his subclass 457 visa. The NOICC included the following particulars:

17. ***"Particulars of grounds for cancellation***

18. *Information before the Department appears to indicate you are no longer in a relationship with Hoang Dat Bui.*

19. *Your visa was granted because the application met, among other criteria, the secondary criteria for the visa on the basis that you are a member of the family unit of Hoang Dat Bui, as prescribed by regulation 1.12 of the Migration Regulations 1994...*

20. The NOICC set out the provision in the Regulations defining "*member of the family unit*" and "*spouse*". The letter explained that the applicant needed to be a member of the family unit of the de facto partner or spouse. It is a requirement under s.5CB of the Act that de facto partners in a de facto relationship must "*live together*" or "*not live separately and apart on a permanent basis*".
21. As the Department had evidence the applicant was no longer living with the de facto partner, the applicant was provided an opportunity to comment or respond to that information and to the NOICC. The applicant was asked to respond within 5 working days after being taken to have received the Department's letter.
22. On 19 December 2018, the applicant sent an email to the Department requesting an extension of time to provide information "*as soon as possible*".⁴ The Department responded

²DIBP file at folio 8

³Ibid at 10

⁴Ibid at 18

by email on 20 December 2018, requesting the applicant provide his response by 2 January 2019.

23. The Department did not receive any response by 2 January 2019, or indeed any further response from the applicant or on his behalf.
24. On 16 January 2019, the Department cancelled the applicant's dependent Subclass 457 visa. The Department sent a letter to the applicant on the same date advising him of the cancellation and his review rights. The cancellation notice informed the applicant of the reasons, including the circumstances and information before the Department which revealed that the applicant and the de facto partner no longer have a mutual commitment to a shared life together, no longer have a genuine and continuing relationship, and are living separately on a permanent basis.⁵ The applicant applied to the Tribunal on 21 January 2019.
25. The Tribunal acknowledged the applicant's request for review lodged 21 January 2019 in a letter to the applicant dated 22 January 2019 attaching a standard information sheet, which included details on how the applicant could provide further information or evidence, this time for the Tribunal.
26. The Tribunal's letter and information includes the following, under the heading "*Can I provide further information or evidence?*":
 27. *"If you have not already provided a copy of the Department's decision, or any other material which you believe supports your application, including a statement explaining why you disagree with the Department's decision, please do so as soon as possible."*⁶
28. The applicant did not respond to that letter or request. The Tribunal then sent a letter to the applicant, post-constitution to a Member on 5 June 2019, inviting the applicant to a hearing as referred to above.
29. The Tribunal has paid careful regard to the information available on the Tribunal's case file, and the Department's file. Notably, the Tribunal has no further or other information than the information available to the Department for consideration when the NOICC was issued and the cancellation decision made.
30. The Tribunal finds on this information that the applicant is no longer in a relationship with the de facto partner and does not meet the requirements of the definition set out above in s.5CB.
31. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116 (1)(a) exists. As that ground does not require mandatory cancellation under s.116 (3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

32. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
33. The factors for consideration generally are:

⁵Ibid at 28

⁶ Tribunal case file at 8

- a. the purpose of the visa holder's travel and stay in Australia
- b. extent of compliance with his visa conditions
- c. any degree of hardship that may be caused
- d. circumstances surrounding the cancellation and whether these were beyond the visa holder's control
- e. past and present behaviour
- f. consequential cancellations
- g. mandatory legal consequences
- h. international obligations of Australia
- i. any family or business ties, and
- j. any other relevant matters

34. The Tribunal has already noted that there is very little information available to it about the applicant or his present circumstances. This is so, notwithstanding invitations for him to provide information and make submissions.
35. The Department's file reveals⁷ that the applicant came to Australia in 2013 and remained on a student visa until the grant of his dependent 457 subclass visa on 26 October 2017. The applicant has not provided any details about what he has been doing in the period since the grant of the student visa in 2014, and the Tribunal does not have that information before it.
36. There is no stated purpose on the available information for the applicant's continuing stay in Australia, other than for his initial period as a dependent student, and subsequently as a dependent Subclass 457 visa holder since October 2017. As a consequence, the Tribunal can place little weight on this consideration entitling the applicant to remain in Australia.
37. It is clear to the Tribunal that the applicant has been in breach of the visa condition since at least August 2018, when the Department was notified of the irretrievable breakdown of the defacto relationship, the relationship being a condition of the grant of the visa. There is no information before the Tribunal as to the extent of any further communications with the applicant, however, the Tribunal notes the applicant advised the Department immediately upon receipt of the Department's communication on 3 December 2018, providing his new address and details. There is no evidence of any other breaches of the visa conditions or failure to comply by the applicant.
38. It is usual to expect that there will be some degree of hardship occasioned by cancelling a visa, particularly in circumstances where the visa holder has been in the country for a considerable period (as here) and has no doubt established some community ties and relationships. It is a fact however that the initial grant of the visa was on a temporary basis to allow the applicant to remain living with the primary 457 visa holder in their de facto relationship. In that regard, the Tribunal notes from the Department's file⁸ that the de facto partner's subclass 457 visa, granted 22 April 2016, expires 22 April 2020. The Tribunal is also mindful that it has no information before it at all as to the personal circumstances experienced by the applicant or what hardship he may encounter, as he has not provided

⁷DIBP file notes at f 37-38

⁸Ibid at f3

any responses or further information notwithstanding an invitation and opportunity to do so. There is no information about the circumstances behind the relationship breakdown or whether that was as a result of circumstances beyond the applicant's control and for which he was not responsible. The Tribunal can place very little weight upon this consideration.

39. The Tribunal has touched upon the applicant's past and present behaviour towards the Department which appears to be compliant, but for the matters set out above. There are no consequential cancellations which follow the cancellation of the applicant visa, he being the secondary visa applicant to the de facto partner.
40. The Tribunal notes there are no international obligations which might be relevant or breached as a consequence of the decision to cancel the applicant's visa. There are no other relevant matters of which the Tribunal is aware and which might weigh in the consideration of this decision.
41. Considering the circumstances as a whole, the Tribunal concludes that on the weight of the information and evidence before it, the visa should be cancelled. No information or submissions have been made in support of the decision not to proceed with the cancellation. For these reasons, the Tribunal has determined not to disturb the Department's decision.
42. The Tribunal affirms the decision to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Alan McMurran
Member